# THE REAL SIGNIFICANCE OF THE AMERICAN TRUCKING DECISION FOR ARIZONA MANUFACTURERS

By
Roger K. Ferland, Esq.
QUARLES & BRADY STREICH LANG LLP

The U.S. Supreme Court's February 27 decision in the American Trucking case made headlines all over the country. According to the press, the decision was a crushing defeat for the business community. The Court reversed the decision of the D.C. Circuit Court of Appeals and upheld EPA's adoption of a new eight-hour ambient air quality standard for ozone. In doing so, the Court invalidated the lower court's resurrection of the unconstitutional delegation doctrine as a basis for striking down the ozone standard and rejected the business community's assertion that EPA was required to consider cost in its adoption of new ambient air quality standards. Lost in the news stories, however, was the issue of greatest significance to manufacturers. When EPA adopts a new standard, how should it be implemented?

The Arizona Association of Industries, along with Intel and the Electronic Industries Alliance (we will call them the "Intel Group" since it was that company that took the lead), thought that the Supreme Court might rule exactly as it did and was concerned that EPA's current position on how it would implement its new ozone standard had the potential to be disastrous for the electronics industry as well as many other manufacturers. Accordingly, the Intel Group filed a Friend of the Court or amicus brief that was restricted entirely to the implementation issue. EPA was sufficiently concerned about the Group's position that it spent one-fourth of its reply brief to the Supreme Court responding to it – an unusual level of interest in an amicus brief. In its decision the Supreme Court ordered EPA to rethink its position on implementation based on many of the arguments made by the Intel Group.

The implementation issue arises because Congress, when it amended the Clean Air Act in 1990, failed to adequately consider that EPA might later change the ozone standards. The 1990 amendments have two very different statutory schemes to govern implementation of ambient air quality standards – Subpart 1 and Subpart 2 of Part D of Title I of the Act. Subpart 2 contains an extremely complex and rigid system of design values, area classifications based on these design values, and different implementation deadlines and requirements that are based on the area classifications. By its language this scheme would appear to only apply to the one-hour ozone standard in effect in 1990. In contrast, Subpart 1 declares that EPA is to require compliance with a new ambient standard "as expeditiously as practicable but no later than 5 years from the date such area is designed nonattainment." It does not contain either the elaborate classification system or the tiered system of requirements in Subpart 2. All of the parties to the Supreme Court case agreed that implementing the new ozone standard under Subpart 2 was impossible. However, the parties disagreed as to what ought to be the alternative. The business parties argued that Subpart 2's inapplicability demonstrated Congress' intent that the ozone standard not be changed. EPA's position was that only Subpart 1 should govern implementation, but the implementation should become effective immediately. Thus, under the EPA view, areas like Phoenix that are currently seeking to comply with the one-hour ozone standard under Subpart 2 would simultaneously be required to comply with the more stringent new standards under Subpart 1. The Intel Group argued for a third position. It maintained that Phoenix and other similar areas should be allowed to achieve attainment of the one-hour ozone standard in accordance with schedule and requirements in Subpart 2, but once attainment was achieved under Subpart 2, the area would be subject to the new ozone standard under the implementation provisions of Subpart 1. In other words, the two ozone standards should be applied sequentially, one under Subpart 2 and one under Subpart 1. To add to the range of positions on this issue, the D.C. Circuit ruled that, whether it made sense or not, the language of the Act requires that any new ozone standard could only be implemented under Subpart 2.

Both the D.C. Circuit's decision and the EPA position on implementation produce absurd results. Subpart 2 is based on a series of design values and a statistical structure that can only apply to the one-hour standard. Applying that structure to the new ozone standard simply does not work. Equally unsatisfactory is the result under EPA's simultaneous implementation of both standards position. Under the schedule in Subpart 2, an area like Los Angeles has until 2010 to achieve attainment and Chicago, Houston and New York City have until 2007. However, if the new ozone standards were implemented under Subpart 1, at the same time as these cities were also subject to Subpart 2 for the one-hour standard, the cities would be required to comply with the new more stringent standard before meeting the deadlines in Subpart 2 for the less stringent current standard. In other words, under the EPA view, the agency could effectively nullify Congress' elaborate provisions in Subpart 2 by adopting a new standard and implementing it immediately under Subpart 1.

In its decision the Supreme Court agreed with the Intel Group in finding that neither the Circuit Court nor EPA positions made either legal or logical sense. Unfortunately, the Court did not clearly state what position it could endorse. Instead, it punted the issue back to EPA for a resolution without telling the agency what that resolution should be. According to the Court, relying entirely upon Subpart 1 to implement the new standard renders "inoperative" the language in the Act that refers to implementation of ozone standards under Subpart 2. However, how Subpart 2 could play any role in the implementation of the new standard is never explained.

EPA must now reconsider its position, and industry and the states should be proactive in helping the agency to either adopt the sequential implementation position urged by the Intel Group in its brief or repeal the one-hour standard and implement the eight-hour standard under Subpart 1 but force states to retain the measures they adopted under Subpart 2 for the one-hour standard. Sequential implementation would allow Subpart 2 to continue its proper function as the implementation mechanism for the one-hour standard. When and only when the one-hour standard was achieved would Subpart 1 become effective to govern implementation of the new ozone standard. Thus, Subpart 2 would have a role as the interim implementation structure until Subpart 1 could appropriately play its role. This reconciliation of the two subparts should satisfy the Court's concern about the role of both subparts while providing a rational framework for implementation of the new ozone standard.

However, if EPA is correct and the one-hour standard is not sufficiently protective of public health, why continue to implement it? Simply repealing the one-hour standard and replacing it with the eight-hour standard can only work if the measures that states like Arizona have adopted to achieve attainment of the one-hour standard and have been successful would have to keep those measures in place, but would be given the discretion to choose among additional measures to achieve the one-hour standard. However, areas that have not achieved the standard must continue to implement all measures that were imposed under Subpart 2 even if implementation of those measures was not complete. In other words, nonattainment areas that had achieved attainment of the one-hour standard would be rewarded by having greater flexibility to choose attainment strategies for the eight-hour standard.

The most important point in either the sequential or replacement implementation strategy is to provide the states with sufficient flexibility to adopt measures in addition to those required to comply with the anti-backsliding criteria we have described. Thus, EPA should be urged not to attempt to impose the prescriptive and inflexible Subpart 2 structures on states that must achieve compliance with the significantly more stringent eight-hour ozone standard.